

OCT 9 1940

CHARLES E. BROWN

Supreme Court of the United States

OCTOBER TERM, 1940

No. 416

STATE NATIONAL BANK OF MAYSVILLE,
KENTUCKY, PETITIONER,

v.

THE CHESAPEAKE AND OHIO RAILWAY
COMPANY, RESPONDENT.

*BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI*

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Reference to the reports wherein may be found the opinions of the Court of Appeals of Kentucky in this case having been omitted from the petition for certiorari, we take the liberty of supplying such omission. The opinion on the first appeal is reported in 280 Ky. 444, 133 S. W. (2) 511; the opinion on the second appeal may be found in the Advance Sheets of 141 S. W. (2) 869.

The opinion on the first appeal contains a full statement of the facts of the case. To avoid confusion, attention is called to what purports to be the opinion on the first appeal on pp. 27-35, Transcript; the opinion as so copied in the transcript of record was actually delivered by the Court of Appeals on June 23, 1939, but in response to the appellee's petition for rehearing (pp. 35-41, Transcript), such opinion was modified and extended on its face, as shown by order of the Court on November 17, 1939 (p. 41,

Transcript). The opinion as so modified and extended does not appear in the transcript of record in this Court, but such opinion in its final form will be found in 280 Ky. 444, 133 S. W. (2) 511.

I

The Judgment of the Kentucky Court of Appeals On The Second Appeal Is Not Reviewable Herein.

As stated, there have been two appeals herein to the Kentucky Court of Appeals. On the first appeal (280 Ky. 444, 133 S. W. (2) 511), the entire case was disposed of on its merits, and the cause remanded to the Circuit Court of Mason County, Kentucky, "with directions to enter a judgment dismissing the petition." The mandate or judgment of the appellate court on this appeal is to be found on pp. 42, 43, Transcript. Pursuant to the judgment of the Court of Appeals, the Circuit Court thereafter, without further proceedings, entered judgment of dismissal (p. 43 Transcript). A second appeal was prayed to the Court of Appeals from this judgment, which was affirmed by the appellate court on June 11, 1940 (Advance Sheets of 141 S. W. (2) 869), upon the ground that the opinion on the first appeal was "the law of the case." The petition for certiorari seeks a review of the judgment of the Court of Appeals on the second appeal.

It is submitted that there was nothing determined on the second appeal which is reviewable in this Court. It is obvious that the case was completely disposed of by the opinion on the first appeal, and that the judgment then rendered by the appellate court was final within the meaning of Sec. 237, Judicial Code (28 U. S. C. A., Sec. 344). It disposed of the entire case on its merits, specifically directed the lower court to enter judgment of dismissal, and left nothing to the discretion of the trial court. The affirmance of such judgment on the second appeal was

solely upon the ground that the opinion on the first appeal was the law of the case. If petitioner desired a review of the cause in this Court, certiorari should have been sought following the determination of the first appeal. It is now too late to review the judgment on that appeal by certiorari proceedings directed to the judgment on the second appeal, which latter judgment determined nothing reviewable in this Court.

Rio Grande Western Railway Co. v. Stringham 239 U. S. 44, 60 L. Ed. 136, 36 S. Ct. 5.

Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. Ed. 822.

Mower v. Fletcher, 114 U. S. 127, 29 L. Ed. 117, 55 S. Ct. 799.

Ches. & Pot. Tel. Co. v. Manning, 186 U. S. 238, 46 L. Ed. 1144, 22 S. Ct. 881.

Northern Pac. R. Co. v. Ellis, 144 U. S. 458, 36 L. Ed. 504, 12 S. Ct. 724.

Gulf Ref. Co. v. U. S., 269 U. S. 125, 70 L. Ed. 195, 46 S. Ct. 52.

Clark v. Willard, 292 U. S. 112, 78 L. Ed. 1160, 54 S. Ct. 615.

First Bank Stock Corp. v. Minnesota, 300 U. S. 635, 81 L. Ed. 853.

(The latter case presenting a situation identical with the instant case).

II

The Petitioner's Criticisms of the Decision of the Court of Appeals Herein Are Without Merit.

(A) As stated in the opinion of the Court of Appeals on the first appeal, it was conceded by the petitioner that in view of the provisions of the Federal Bills of Lading Act (49 U. S. C. A., Secs. 81, *et seq.*), no recovery could be had by it under that Act. Such concession was inescapable in view of the unambiguous nature of the provisions of

Secs. 29 and 32 of the Act (49 U. S. C. A., Secs. 109, 112).
The conclusion of the Kentucky Court as to the non-liability of the respondent under the Act, independent of the concession to that effect, is supported by the following decisions.

Quality Shingle Co. v. Old Oregon Lbr. & Shingle Co.,
(Wash.) 187 Pac. 705.
Gitchell v. Nor. Pac. Ry. Co. (Wash.) 187 Pac. 707.
Kasden v. New York, etc. R. Co. (Conn.) 133 Atl. 573.
Hinrichs v. Standard Trust & Savings Bank (C.C.A.
2), 279 Fed. 383. (Cert. Den. 258 U. S. 629)
Weyerhaeuser Lbr. Co. v. First Nat. Bk. (Ore.) 38
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Dir. Gen. v. Chandler (Va.) 106 S. E. 226.
Mo. Pac. R. Co. v. Askeu (Mo.) 256 S. W. 566.
Knapp v. Minneapolis, etc. R. Co. (N.D.) 159 N.W. 81.

(B) As to bills of lading for interstate transportation, the Federal Act is controlling as to the duties and liabilities of the parties thereto, and the conduct of business thereunder:

See 49 U. S. C. A. Sec. 81, and notes thereto, and in particular,

Ches. & Ohio v. Martin, 283 U. S. 209, 75 L. Ed. 983,
51 S. Ct. 453.
Atchison, etc. Ry. Co. v. Harold, 241 U. S. 371, 60
L. Ed. 1050, 36 S. Ct. 665.
Browne v. Union Pac. R. Co. (Kan.) 216 Pac. 299,
(Affd. 267 U. S. 255).

(C) The controlling effect of the Federal Act can not be avoided by the petitioner's attempted characterization of the suit as one based, not on the bills of lading, but on the reckless or negligent use of language; or, to express the same thought in the language of the Kentucky court, "a litigant may not by an attempted characterization of the nature and form of his action, control the application of legal principles":

Georgia F. & A. R. Co. v. Blish Milling Co. 241 U. S. 190, 60 L. Ed. 948, 36 S. Ct. 541.
Southern Ry. Co. v. Prescott, 240 U. S. 632, 60 L. Ed. 836, 36 S. Ct. 469.
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Springfield Light, etc. Co. v. Norfolk & W. R. Co. (D. C. Ohio) 260 Fed. 254.
M. & T. Trust Co. v. Export S. S. Corp. (N.Y.) 262 N. Y. 92, 186 N. E. 214.
Corrello v. Railway Ex. Agency (Ohio) 3 N. E. (2d) 659.

(D) There is no conflict between the decision of the Kentucky Court of Appeals herein and the decisions of the United States Circuit Court of Appeals for the Eighth Circuit in *Chicago & N. W. R. Co. v. Stevens National Bank of Fremont*, 75 Fed. (2) 398, and *Boatmen's National Bank of St. Louis v. St. Louis, Southwestern R. Co.* 75 Fed. (2) 494. Both cases cited involved "order" bills of lading, whereas "straight" bills are the foundation of this action; this distinction is clearly pointed out by the Kentucky court and it was expressly stated in the opinion that,—“We are in accord with the conclusion reached in that case (the Stevens case), but are of the opinion that it is applicable only to order bills.” The criticism of some of the language and reasoning in the opinion in the Stevens case, does not create a conflict between that decision and the decision herein. But even if such conflict be assumed to exist, that, of itself, does not authorize the granting of certiorari under either *Sec. 237, Judicial Code (28 U. S. C. A., Sec. 344)*, or *Rule 38, Supreme Court Rules*.

It is respectfully submitted that the petition for writ of certiorari herein should be denied.

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